APR 2) 1955
HAROLD B. WILLEY, Cl

In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 758

NATIONAL AIRLINES, INC.,
Petitioner,

v.

THELMA SCHOLNIK,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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April 26, 1955.

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In the Supreme Court of the United States

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No. .....

NATIONAL AIRLINES, INC.,
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THELMA SCHOLNIK,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the judgment entered February 4, 1955, in cause No. 12,170 on the docket of said court, wherein the Court of Appeals:

1. *Reversed* the judgment of the United States District Court for the Northern District of Ohio, which had dismissed respondent's diversity suit on the ground petitioner, National Airlines, Inc., was not doing business in Ohio and was not there subject to suit for an accident occurring in Florida.

2. *Held* the rule applied by this Court in "analogous cases involving connecting railroad carriers," *Green v. Chicago, Burlington and Quincy Railway Company* (1907), 205 U. S. 530, and *Philadelphia & Reading Railway Company v. McKibbin* (1917), 243 U. S. 264, "has been materially changed by

later decisions of the Supreme Court," and is "no longer a correct statement of the law."

This Court has never overruled, confined, or modified *McKibbin* and *Green*. Whether, in view of *International Shoe Co. v. State of Washington* (1945), 326 U. S. 310, those decisions are still to be followed, is a point on which the district courts are in disagreement. Like Swiss guards they may be found fighting on both sides of the question.

OPINIONS BELOW.

The opinion of the District Court for the Northern District of Ohio (by Judge Jones) has not been reported; it is printed in the appendix hereto, page 17.

The opinion of the Court of Appeals for the Sixth Circuit (Judge Miller writing the opinion, concurred in by Judges Allen and McAllister), printed in the appendix, page 22, is reported in 219 F. 2d 115.

JURISDICTION.

The judgment presented for review is dated, and was entered, February 4, 1955. Rehearing was not sought.

This Court has jurisdiction under 28 U. S. C. § 1254-(1) to review by writ of certiorari upon petition therefor filed within the 90 days specified by 28 U. S. C. § 2101(c).

QUESTIONS PRESENTED.

The case brings for review the questions:

1. Whether the court below erred in holding this Court's decisions in *Green v. Chicago, Burlington and Quincy Railway Company* (1907), 205 U. S. 530, and *Philadelphia & Reading Railway Com-*

pany v. McKibbin (1917), 243 U. S. 264, are no longer law.

2. Whether an airline, having no authorization by the Civil Aeronautics Board for flights into or through Ohio, operating no planes into or through that state, having never qualified to do business in Ohio, and maintaining no office, property, or employees in that state, is doing business in Ohio and subject to the jurisdiction of a federal court in that state in a tort action arising in Florida, merely because it leases aircraft and flight crews to a connecting carrier for through flights and the connecting carrier solicits business and sells tickets in Ohio good on the lessor airline's out of state lines.

3. Whether the District Court's finding that such lessor-airline did not have contacts with the state of the forum to support jurisdiction is entitled to the same credit as findings under Rule 52 of the Federal Rules of Civil Procedure which are not reversible absent clear error.

STATUTES APPLICABLE.

The Fifth Amendment to the Constitution of the United States says:

"No person shall * * * be deprived of * * * property, without due process of law; * * *."

28 U. S. C. § 1391(c) provides:

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

STATEMENT OF CASE.

Respondent, a passenger aboard a National Airlines plane, on a flight from Havana, Cuba, to Miami, Florida, says she was injured when, by reason of the airline's asserted negligence in the operation of the plane "she was thrown out of her seat into the aisle." (Tr. 5a, 6a.)

The accident happened "after said airplane had reached a point in Florida." (Tr. 5a.)

Suit was brought in the United States District Court for the Northern District of Ohio on diversity grounds, National being a Florida corporation and respondent a citizen of Ohio. (Tr. 5a, 9a.)

Summons was served upon National by serving Capital Airlines, Inc. (Tr. 7a), a separate, unrelated corporation (Tr. 9a), and by running a later summons (Tr. 20a) to the pilot of a plane owned by National Airlines when it touched at the Cleveland airport while operated by Capital under lease from National. (Tr. 46a.)

The District Court quashed service and dismissed the suit. (Tr. 52a.)

The Court of Appeals reversed.

—Jurisdiction Rested on Lease of Equipment to Connecting Carrier.

Capital Airlines, Inc. is not a subsidiary or parent of, or in any way related to, National. (Tr. 9a.) It does, however, have an "Equipment Interchange Leasing Agreement" with National. (Tr. 21a.)

Capital operates north and west from Washington, D. C. National operates south from Washington. (Tr. 12a.) During the winter months, from November 1 to April 30, when southern traffic increases and northern travel lessens, Capital has a surplus of equipment. (Tr. 13a.) It, therefore, leases aircraft and flight crews to National, which National operates on its flights from Washington to the

south. During the summer months, from May 1 to October 31, when the traffic flow is the other way, National in turn leases aircraft and crews to Capital, which Capital operates as its own on its lines to the north and west. (Tr. 13a, 23a.)

The interchange is made at the Washington, D. C., airport, where both lines touch. As the Court of Appeals noted (Appendix, pp. 23-24):

> "The leasing of such equipment by one to the other enables the two lines to operate continuous through flights between Cleveland and Miami or Havana, stopping at Washington. Under the Lease, a National plane, after arriving at Washington from the South, is leased, together with its National operating crew, to Capital, and then continues on to Cleveland over the Capital route. Similarly, a Capital plane after arriving in Washington from Cleveland, is leased, together with its Capital operating crew, to National, and then continues south over the National route. Through tickets are sold by each line, which show that the trip northwest of Washington was being made by Capital, and that the trip south of Washington was being made by National. Such through transportation is advertised by Capital out of its Cleveland office."

The lease specified that (Tr. 27a):

> "Flights with planes leased under the terms of this agreement shall be under the absolute operational control of the lessee during the period of the lease, and the leased flight crews shall be under the exclusive operational control of the lessee during the period of the lease."

National operated no flights into Ohio, maintained there no office, property or employees, had not qualified to do business in the state, had appointed no agent for service of process; in short, apart from the lease, National had no "contacts" of any kind with Ohio. (Tr. 9a, 12a, 15a, 21a.)

—Court of Appeals Found Jurisdiction by Refusing to Follow Green and McKibbin.

The District Court, applying the "minimum contacts" test of *International Shoe Co. v. State of Washington* (1945), 326 U. S. 310, held National not subject to suit in Ohio. The Court said (Appendix, p. 20):

> "National is not, in my view, doing business in Ohio, and in the circumstances of this case, the requirements of due process prevent an exercise of jurisdiction by the court."

The Court of Appeals took a different view.

It reviewed the operations under the lease. It conceded (Appendix, pp. 27-28) that in *Green*, 205 U. S. 530, and *McKibbin*, 243 U. S. 264, this Court ruled "such activities by a connecting carrier within the jurisdiction did not confer jurisdiction over the foreign corporate carrier who, although receiving benefits therefrom, did not itself operate within the state."

But the Court of Appeals declined to follow those cases.

It so refused on the ground they, though unreversed by this Court, are not law.

REASONS FOR ALLOWANCE OF WRIT.

The Court should grant the writ because:

1. Judgment Below Is in Conflict With Decisions of This Court.

The repudiation by the Court of Appeals of *Green v. Chicago, Burlington and Quincy Railway Company* (1907), 205 U. S. 530, and *Philadelphia & Reading Railway Company v. McKibbin* (1917), 243 U. S. 264—when this Court has not done so—presents a question of law of obvious importance.

For one thing, although this Court has urged alertness to resist "extension * * * of jurisdiction * * * in the federal system," *Baltimore Contractors, Inc. v. Bodinger* (1955), 348 U. S. 176, 181, the decision below foretells substantial enlargement in the diversity jurisdiction of the federal courts. It authorizes suits against rail carriers and airlines, not only where they operate, but wherever their equipment and goods travel under lease over connecting lines and wherever business over their lines is solicited by a connecting carrier. It rejects the caution voiced for this Court by Mr. Justice Brandeis in *Davis v. Farmers Co-operative Equity Company* (1923), 262 U. S. 312, that (p. 317):

> "orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a State in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad * * *."

The judgment of the Court of Appeals casts doubt as well on decisions like *Bank of America v. Whitney Central National Bank* (1923), 261 U. S. 171, holding a Louisiana bank not subject to suit in New York even though it (p. 173) "had what would popularly be called a large New York business." There, it appeared (p. 173) "The transactions were varied, important and extensive. * * * Its regular New York business was transacted for it by its correspondents—the six independent New York banks."

As this Court put it (p. 173) "They, not the Whitney Central, were doing its business in New York."

The same is true here; Capital, not National, was doing business in Ohio.

The Court of Appeals in effect treated the connecting carrier as if it were National's agent, and its acts those of

National, forgetting that jurisdiction of foreign corporations, as Mr. Justice Brandeis observed (261 U. S., at p. 173):

> "does not rest upon a fiction of constructive presence, like *qui facit per alium facit per se*. It flows from the fact that the corporation itself does business in the State or district in such a manner and to such an extent that its actual presence there is established."

—The Issue in Green and McKibbin.

In view of the reach of the judgment presented for review, it will be well to note what it was this Court ruled in the *Green* and *McKibbin* cases which the Court of Appeals now jettisons. As the Court will recall:

Green, 205 U. S. 530, concerned suit brought in the United States District Court in Pennsylvania for injuries received in Colorado by negligence of the Burlington Railroad. The Burlington did not operate east of Chicago. But it did maintain in Philadelphia an office and a district freight and passenger agent. The Court held service on the agent was not enough.

McKibbin, 243 U. S. 264, held a railroad not owning or operating any part of its lines in New York, could not be sued there for an accident occurring in New Jersey, merely because cars owned and shipped by it, loaded with goods of its shippers, regularly moved in New York over the lines of a connecting carrier, or because the connecting carrier sold, within the state, tickets good on defendant's lines and displayed defendant's name in its station and in the telephone directory. This Court held the United States District Court in New York without jurisdiction. The Court,

speaking through Mr. Justice Brandeis, said (p. 268):

> "Obviously the sale by a local carrier of through tickets does not involve a doing of business within the State by each of the connecting carriers. If it did, nearly every railroad company in the country would be 'doing business' in every State."

This Court has frequently cited those cases. It has never repudiated them.

—Court of Appeals Refused to Follow Those Cases.

The Court of Appeals considered *Green* and *McKibbin* no longer law on the basis of its reading of *International Shoe Co. v. State of Washington* (1945), 326 U. S. 310, citing for that reading two of its own decisions and one from the Court of Appeals for the District of Columbia. (Appendix, p. 28.)

In addition, the Court of Appeals cited seven District Court cases (Appendix, p. 29), four from the Northern District of Ohio, one from California, one from Kentucky, and one from New York.

For these decisions thus made controlling in the Sixth Circuit, and its judgment in this case, the Court of Appeals believed it found nourishment in *International Shoe Co. v. State of Washington* (1945), 326 U. S. 310. But, as the Court will recall, that case did not deal with a cause of action arising in a foreign state, or with activities foreign to the state. On the contrary, the Court held Washington could, consistently with due process, subject a Missouri corporation to suit in Washington to collect payments due the Washington Unemployment Compensation Fund where the employer maintained 11 to 13 full-time salesmen who (p. 313) "resided in Washington," whose

activities "were confined to that state," who "were compensated by commissions based upon the amount of their sales," who rented (p. 314) "permanent sample rooms, for exhibiting samples, in business buildings" or "rooms in hotels or business buildings temporarily for that purpose."

Other "later decisions" to which the Court of Appeals referred are:

Travelers Health Association v. Virginia (1950), 339 U. S. 643, where the Court held Virginia could issue a cease and desist order on a Nebraska company with respect to insurance sold by it by mail in Virginia.

Milliken v. Meyer (1940), 311 U. S. 457, where the Court sustained substituted service on a domiciliary of a state when he was absent therefrom.

Perkins v. Benguet Consolidated Mining Co. (1952), 342 U. S. 437, where the Court held the due process clause did not compel Ohio either to subject to, or to exempt from, suit in Ohio a foreign corporation carrying on in Ohio a continuous and systematic although limited part of its business.

In those cases the defendants resisting suit had a relationship to the state of the forum differing materially in kind and quality from the case of interchange of equipment and sale of tickets good on distant carriers.

The distinguishing factor in *International Shoe, Travelers,* and *Perkins* is that in those cases the suits arose out of the very activities within the territory of the forum which were held to constitute the necessary "contacts" with the state to support jurisdiction.

That was not the case in *Green* and *McKibbin.*

It is not the fact in the case at bar.

The Court of Appeals, it is obvious, has decided an important question of federal law which only this Court can settle.

2. District Courts Are in Disagreement as to Rule Which Should Be Applied.

Some of the district courts, acting upon implications they draw from *International Shoe Co. v. State of Washington* (1945), 326 U. S. 310, have, as the Court of Appeals noted, refused to apply *Green* and *McKibbin*.

However, as many more have taken the opposite view.

The result is unending conflict in the districts.

And, strangely, the question is one which appears rarely to reach the reviewing courts. It may be it is cheaper to settle. Or, the losing party, if defendant, thinks it may win its case anyway, or if plaintiff, prefers to look for a more hospitable forum rather than hazard all on the chances of appeal. The consequence is that the question, characterized by the district courts as "ever-vexatious" and "oft litigated but never settled," [1] "difficult," [2] and "thorny," [3] will, until this Court speaks, continue to breed contrariety of decision from district to district.

The perplexity faced by the district courts in the practical administration of justice in the law's present uncertainty is reflected in the reports. Subsequent to *International Shoe* at least sixteen districts in twelve states have adhered to the view that *Green* and *McKibbin* remain law and on that basis have held defendants not subject to suit:

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[1] 113 F. Supp. 737, 746.

[2] 72 F. Supp. 437, 440.

[3] 12 F. R. D. 508, 509.

In Pennsylvania:

Miller v. Tulsa Petroleum Co. (M. D. Pa., 1953), 117 F. Supp. 359;

Noerr Motor Freight, Inc. v. Eastern R. R. Presidents Conference (E. D. Pa., 1953), 113 F. Supp. 737;

Read v. Corbitt Co. (E. D. Pa., 1950), 10 F. R. D. 125;

Murray v. Great Northern Ry. Co. (E. D. Pa., 1946), 67 F. Supp. 944;

Solt v. Interstate Folding Box Co. (E. D. Pa., 1954), 123 F. Supp. 376.

In Minnesota:

Watterson v. New York Central System (D. C. Minn., 1953), 111 F. Supp. 448;

Myers Motors, Inc. v. Kaiser-Frazer Sales Corporation (D. C. Minn., 1948), 76 F. Supp. 291;

Webber v. Pan American Airways, Inc. (D. C. Minn., 1949), 85 F. Supp. 959;

Nordgren v. Evis-Northwest, Division of Northwest Industrial Service Corp. (D. C. Minn., 1954), 15 F. R. D. 453.

In Nebraska:

Nagl v. Northern Warren Corporation (D. C. Neb., 1948), 8 F. R. D. 130.

In Illinois:

Stetson China Co. v. D. C. Andrews & Co. of Illinois, Inc. (N. D. Ill., 1948), 9 F. R. D. 135.

In Arkansas:

McWhorter v. Anchor Serum Co. (W. D. Ark., 1947), 72 F. Supp. 437.

In Alaska:

Leakley v. Canadian Pacific Express Co. (D. C. Alaska, 1949), 82 F. Supp. 906.

In North Dakota:

Anderson v. Page & Hill Homes, Inc. (D. C. N. D., 1950), 88 F. Supp. 408.

In Montana:

Clapper Motor Co. v. Robinson Motor Co. (D. C. Mont., 1954), 119 F. Supp. 79.

In Georgia:

Zuber v. Pennsylvania R. Co. (N. D. Ga., 1949), 82 F. Supp. 670.

In Missouri:

Doyle v. Southern Pac. Co. (E. D. Mo., 1949), 87 F. Supp. 974.

In Massachusetts:

Pike v. New England Greyhound Lines, Inc. (D. C. Mass., 1950), 93 F. Supp. 669.

In New York:

Toothill v. Raymond Laboratories, Inc. (E. D. N. Y., 1951), 100 F. Supp. 350;

Smith v. Louisville & N. R. Co. (S. D. N. Y., 1950), 90 F. Supp. 189;

Goldstein v. Chicago, R. I. & P. R. Co. (W. D. N. Y., 1950), 93 F. Supp. 671;

Cole v. Stonhard Co. (N. D. N. Y., 1952), 12 F. R. D. 508.

In none of these cases was an appeal taken. The decisions, therefore, presumably state the law prevailing in those jurisdictions, indicating that, until the problem is

settled by this Court, defendants will continue to be dismissed or held, depending on views which happen to prevail in the district where suit is brought.

The decision below may settle the question for the Sixth Circuit. But it is likely only to hot the debate in other districts, many of which have said they will await word from higher authority before they yield their view that *Green* and *McKibbin* remain law and are to be followed. In the meantime energy better spent adjudicating substantive merits will continue to be dissipated by litigants the country over in trying to find out whether they have come to the right court house.

For example, in *Zuber v. Pennsylvania R. Co.* (N. D. Ga., 1949), 82 F. Supp. 670, the court said (p. 675):

> "Sufficient it is to say in this Court that an examination of the authorities reveals that the *Green* case, *supra,* is still declaratory of the law. This Court is not only a believer in the validity and necessity of precedent and the rule of *stare decisis* within proper limits, but whether or not a believer, it is certainly bound. If changes in the application of the laws should be made, and well they might be in some aspects of this question, such change is a matter for more authoritative courts."

And in *Noerr Motor Freight, Inc. v. Eastern R. R. Presidents Conference* (E. D. Pa., 1953), 113 F. Supp. 737, observing that (p. 748) "this district has rather consistently followed the *Green* case," the court held (p. 748):

> "because of decisions in this district indicating a strict adherence to the ruling in the *Green* case, despite the views expressed in *International Shoe Co. v. State of Washington,* 326 U. S. 310, 60 S. Ct. 154, 90 L. Ed. 95, as it relates to the concept of 'doing business,' I feel constrained in this case to find that the named defendants are not 'doing business' and may not be

'found' within this district and are therefore not subject to service of process here."

The machinery of the law ought to be so sure and certain that litigant and counsel may know what court is open to them.

This is not so now.

CONCLUSION.

This case brings for review an important, and persistently arising, question of federal jurisdiction on which the district courts are at odds. That conflict the Courts of Appeals cannot resolve because (a) the controversy, as history shows, usually ends with the district court's decision and (b) they cannot in any event authoritatively say which of this Court's decisions need no longer be followed.

The resulting diversity of decision from district to district, already of such proportions that district courts in one-fourth of the states follow a rule at variance with that announced by the court below, is apt to continue to mount until this Court settles the question.

The writ should issue.

Respectfully submitted,

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April 26, 1955,
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